No. 10526

In the United States Circuit Court of Appeals for the Ninth Circuit

AL C. FOX, ET AL., APPELLANTS

v.

SUMMIT KING MINES, LIMITED, A CORPORATION, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEVADA

BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

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The Administrator of the Wage and Hour Division, United States Department of Labor, is charged with the duty and responsibility of administering the Fair Labor Standards Act. Because this case presents significant questions of interpretation of that Act, the Administrator, by leave of Court, submits this brief as *amicus curiae*.

STATEMENT

This is an appeal from a final judgment of the District Court of the United States for the District of Nevada dismissing, after trial, appellants' suit

for unpaid overtime compensation, an additional equal amount as liquidated damages, and attorneys' fees. The suits were instituted pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Sec. 201.

STATEMENT OF THE CASE

The Court found that appellee produced gold and silver ores in Nevada where they were reduced to bullion and then shipped by appellee through the United States mail to the United States Mint at San Francisco, California (R. 28). Appellants were employed in appellee's mill or reduction works in the production of the ores or their reduction to precipitates or bullion (R. 13). Upon these facts, the trial court found that appellants were not engaged in interstate commerce or in the production of goods for interstate commerce (R. 22, 26, 28).[1]

ARGUMENT

Appellants are engaged in the production of goods for interstate commerce

The District Court, in concluding that appellants were not subject to the Act, relied chiefly on *Holland* v. *Haile Gold Mines,* 44 F. Supp. 641 (W. D. S. C.).

[1] This case also involves the question whether appellants are entitled to compensation for any part of the time which appellee termed a meal period. The Administrator is not primarily interested in this question, the answer to which, in his opinion, depends upon whether they were relieved of all duties during the meal period. See *Walling* v. *Dunbar Transfer and Storage Co.*, 6 Wage Hour Rept. 476 (W. D. Tenn. 1943); *Emerson* v. *Mary Lincoln Candies*, 174 Misc. 353, 20 N. Y. S. (2d) 570 (Sup. Ct. Erie Co., N. Y., 1940), affirmed, 261 App. Div. 879, 26 N. Y. S. (2d) 489, affirmed, 287 N. Y. 33, 38 N. E. (2d) 234,

However, the *Haile* case has subsequently been reversed by the Circuit Court of Appeals for the Fourth Circuit, 136 F. (2d) 102, in an opinion which carefully considers the arguments advanced in support of the District Court's position and explicitly rejects them.[2]

Under a literal reading of the statute, appellants fall squarely within its coverage as employees engaged in the production of goods for interstate commerce. "Production" as defined in Section 3 (j) of the Act expressly includes "mining." "Goods," as defined in Section 3 (i), means "* * * articles or subjects of commerce of any character," and therefore includes gold bullion, which was specifically described by the Supreme Court as a subject of commerce in the case of *United States* v. *Marigold*, 9 How. 560, 556–567. "Commerce" as defined in Section 3 (b) includes "* * * transportation * * * from any State to any place outside thereof." The literal lan-

[2] The view of the Fourth Circuit is in accord with the decisions of this Court and other courts under the National Labor Relations Act (*National Labor Relations Board* v. *Sunshine Mining Co.*, 110 F. (2d) 780, certiorari denied, 312 U. S. 678; *Canyon Corp.* v. *National Labor Relations Board*, 128 F. (2d) 953 (C. C. A. 8); cf. *National Labor Relations Board* v. *Idaho-Maryland M. Corp.*, 98 F. (2d) 129 (C. C. A. 9) in which a contrary result was reached because the Mint was located in the same State as the mine and the subsequent transfer across State lines was considered an administrative act of a Government agency). See also *Timberlake* v. *Day and Zimmerman*, 49 F. Supp. 28 (S. D. Iowa).

guage of the statute thus expressly encompasses these employees.[3] *Walling* v. *Haile Gold Mines,* 136 F. (2d) 102.

The court below did not explain the basis for its conclusion that the appellants were not engaged in the production of goods for commerce, except to cite the subsequently reversed District Court *Haile* decision and to emphasize (R. 22, 26, 28) that the ores were shipped to a United States Mint. But transmission through the mails has long been recognized as interstate commerce (*International Textbook Co.* v. *Pigg,* 217 U. S. 91) and the mere fact that the customer is a United States Mint does not render it any the less so (*National Labor Relations Board* v. *Sunshine Mining Co.,* 110 F. (2d) 780 (C. C. A. 9), certiorari denied, 312 U. S. 678).

Nor can there be any question of the constitutional power of Congress to regulate the wages and hours of these employees, as suggested by the District Court in the *Haile Gold Mines* case even if it be conceded, arguendo, that there is no interstate competition in gold and silver. See *United States* v. *Darby,* 312 U. S. 100, in which the Supreme Court sustained the constitutionality of the Fair Labor Standards Act, and said (p. 116):

> * * * the power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution.

[3] The coverage of the Act is to be broadly construed. *Fleming* v. *Hawkeye Pearl Button Co.,* 113 F. (2d) 52 (C. C. A. 8); *Bowie* v. *Gonzalez,* 117 F. (2d) 11 (C. C. A. 1).

It is not necessary that the article regulated by Congress be of a "commercial" character, as the cases relied on by the Supreme Court in *Darby* well demonstrate. See *Gooch* v. *United States,* 297 U. S. 124 (kidnapped persons); *Brooks* v. *United States,* 267 U. S. 432 (stolen automobiles); *Weber* v. *Freed,* 239 U. S. 325 (prize fight films); *Hoke* v. *United States,* 227 U. S. 308, and *Caminetti* v. *United States,* 242 U. S. 470 (women for immoral purposes); *Champion* v. *Ames* (*Lottery Case*), 188 U. S. 321 (lottery tickets); *Reid* v. *Colorado,* 187 U. S. 137 (diseased stock); *United States* v. *Simpson,* 252 U. S. 465; and *United States* v. *Hill,* 248 U. S. 420 (intoxicating liquors for personal use). This point was reiterated more recently in *Edwards* v. *California,* 314 U. S. 160, where the Court, in striking down as an invalid regulation of interstate commerce an attempt by the State to exclude indigent persons, said:

> It is immaterial whether or not the transportation is commercial in character (p. 172).

The Fair Labor Standards Act also has been held applicable to goods which never came into competition with goods in other States. In addition to *Walling* v. *Haile Gold Mines, supra,* see *Atlantic Co.* v. *Walling,* 131 F. (2d) 518 (C. C. A. 5); *Hamlet Ice Co.,* v. *Fleming,* 127 F. (2d) 165, certiorari denied, 317 U. S. 634; *Chapman* v. *Home Ice Co.,* 136 F. (2d) 353 (C. C. A. 6), petition for certiorari pending, in which the Act was held applicable to the production of ice used for the refrigeration of freight cars and consumed in transit, so that it never reached another State as an article of trade.

CONCLUSION

Appellants' activities fall within the literal language of the statute and are subject to congressional regulation under the Commerce Clause. Accordingly the court below erred in concluding that appellants were not engaged in work subject to the Act.

Respectfully submitted.

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